INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and regulation involved	3
Statement	4
Argument	6
Conclusion	12

CITATIONS

Cases:	
Escobedo v. *Illinois*, 378 U.S. 478	7
James v. *United States*, 366 U.S. 213	6
Johnson v. *New Jersey*, 384 U.S. 719	7
Massiah v. *United States*, 377 U.S. 201	7
Miranda v. *Arizona*, 384 U.S. 436	7
O'Dwyer v. *Commissioner*, 266 F. 2d 575, certiorari denied, 361 U.S. 862	8
Reichert v. *Commissioner*, 19 T.C. 1027, affirmed, 214 F. 2d 19, certiorari denied, 348 U.S. 909	8
United States v. *Jett*, 352 F. 2d 179, certiorari denied, 383 U.S. 935	8
United States v *Stratton*, N.D. Ill., decided March 10, 1965 (65-1 U.S.T.C., para. 9289)	8
Statutes:	
Business Records Act, 28 U.S.C. 1732	12
Internal Revenue Code of 1954:	
26 U.S.C. 7201	3, 4
26 U.S.C. 7605	2, 3, 11
Miscellaneous:	
Rev. Rul. 54-80, 1954-1 Cum. Bull. 11	3, 8

327-259—68

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 718

WILLIAM J. DAWSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–22a) is reported at 400 F. 2d 194.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1968. A petition for rehearing was denied on September 9, 1968. By order of Mr. Justice Harlan, the time for petitioning for a writ of certiorari was extended to and including November 8, 1968, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether certain statements voluntarily made by petitioner during an investigation of his tax liability should have been suppressed because his attorney was not present.

2. Whether prejudicial error occurred in quashing a subpoena requiring the appearance of the District Director of Internal Revenue as a witness at the trial.

3. Whether it was prejudicial error to exclude from evidence petitioner's diaries listing political contributions, even though petitioner was permitted to testify concerning the amounts of contributions as recorded in the diaries.

4. Whether it was reversible error for the district court to refuse to admit petitioner's net-worth summaries in evidence, when they were offered before an evidentiary foundation had been laid and were not offered for admission thereafter.

5. Whether sufficient evidence supported the jury's finding that petitioner had unreported income in the form of political contributions that he diverted to his personal use.

6. Whether any evidence should have been excluded because allegedly obtained by means of a second examination of petitioner's records in violation of Section 7605(b) of the Internal Revenue Code of 1954, which first requires an official notice of the need for re-examination.

7. Whether it was reversible error for the district court to admit in evidence certain business records of third parties, tending to corroborate testimony concerning a bribe received by petitioner.

STATUTES AND REGULATION INVOLVED

The Internal Revenue Code of 1954 provides in pertinent part:

> SEC. 7201. Attempt to evade or defeat tax.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.
> [26 U.S.C. 7201.]
>
> SEC. 7605. Time and place of examination.
>
> * * * * *
>
> (b) *Restrictions on Examination of Taxpayer.*—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.
> [26 U.S.C. 7605.]

Rev. Rul. 54–80, 1954–1 Cum. Bull. 11, provides in pertinent part:

> Advice is requested whether that part of the political contributions received by a political organization or an individual seeking political office which is diverted to the personal use of the candidate or other individual constitutes

taxable income to such candidate or other individual.

Contributions to political organizations are customarily made with the intent and understanding that they be used for the expenses of a political campaign or for some similar purpose. Such contributions are not deductible for Federal income tax purposes by the donor. See I. T. 3276, C. B. 1939–1 (Part 1), 108.

Where a political gift is received by an individual or a political organization and it is held or used for the purposes intended, i.e., for present or future expenses of a political campaign or for some similar purpose, it is not taxable income to the recipient. See I. T. 3276, *supra.* However, any amount diverted from the channel of campaign activities and used by a candidate or other individual for personal use constitutes taxable income to such candidate or other individual for the year in which the funds are so diverted. * * *

STATEMENT

Petitioner was indicted in three counts for willful attempts to evade the income tax owed by him for the years 1959, 1960 and 1961 by filing false and fraudulent joint income tax returns in violation of Section 7201 of the Internal Revenue Code of 1954, *supra,* p. 3. After a jury trial, petitioner was found guilty on the counts concerning the years 1959 and 1961 and not guilty on the count concerning 1960 (Pet. App. 2a–3a.)

Under Count I, covering 1959, the government introduced evidence showing that after petitioner—as

chairman of the Democratic Committee of the city of Cohoes, New York—received a $1,750 bribe, he failed to include this amount on his income tax return. The government also established that he similarly failed to report a gain of $1,300 on the sale of real estate (Pet. App. 3a–4a.)

Under Counts II and III, concerning petitioner's returns for the years 1960 and 1961, the government sought to demonstrate that petitioner had had unreported income by using the "net worth plus nondeductible expenditures method." By this approach it was shown that petitioner had had unreported taxable income of $29,588.87 for the year 1960 and $69,369.77 for the year 1961, consisting largely of amounts invested by petitioner in a newspaper publishing business, in a real estate holding company, and in the purchase of an automobile (Pet. App. 9a).

Petitioner conceded that the investments were made, but testified that his investment in the newspaper and his purchase of a Lincoln Continental automobile represented a non-personal use of political funds and that his other investments came from a previously-accumulated cash hoard of about $50,000 (R. 711, 1954–1963, 1980, 1993, 2026–2028, 2107–2140, 2162).[1] The court of appeals reviewed the evidence and concluded that there was sufficient credible evidence for the jury to conclude beyond a reasonable doubt that petitioner "treated the contributions here involved as his own

[1] "R." refers to the appendix to petitioner's brief in the court of appeals; "Supp. R." refers to the appendix to the government's brief in that court.

monies, assumed complete dominion over them, and spent or invested them purely for his own advantage and in his own interest" (Pet. App. 17a).[2]

ARGUMENT

The petition raises no issue of law not fully and correctly disposed of by the court below. Further review is not warranted.

1. Petitioner contends (Pet. 14–21) that his constitutional right to counsel was violated and that the canons of legal ethics were transgressed when representatives of the government permitted him to speak at conferences without the presence of an attorney. For a variety of reasons, this contention is baseless. All of his encounters with federal officials pre-dated his indictment, and the undisputed facts conclusively show, as the court of appeals observed (Pet. App. 19a–20a), that petitioner was repeatedly warned of his right to counsel, on various occasions refused to talk to agents, and was at no time "restrained of his freedom of action in any significant way." Although he had retained counsel, he twice *sought* to speak with government officers when he knew his counsel would not be present (Pet. App. 19a, n. 11). He requested and was granted a conference in Washington, D.C.,

[2] The court below surmised that the jury acquitted petitioner on count two because of a finding, permitted by the district court's instructions, that petitioner's failure to include these amounts on his 1960 return was not "wilful", because it was not until May 15, 1961, that this Court, in *James* v. *United States*, 366 U.S. 213, overruled prior case law and held that the proceeds of embezzlement or conversion *are* taxable income. The return for 1961 was filed long after *James* settled the includability of such income (Pet. App. 10a–12a).

and arrived without his attorney (R. 2126; Supp. R. 96–98; Pet. App. 19a, n. 11). Similarly, he requested and was granted a conference with the United States Attorney at Albany, New York (Supp. R. 96–98; Pet. App. 19a, n. 11). In fact, he even insisted on talking about the investigation with revenue agents, over their objections (R. 1148).

Obviously petitioner's reliance on *Escobedo* v. *Illinois,* 378 U.S. 478, *Miranda* v. *Arizona,* 384 U.S. 436, and *Massiah* v. *United States,* 377 U.S. 201, is misplaced. On each occasion during which petitioner made incriminating admissions, he either had counsel present, or had himself sought the conference, or had at least initiated the discussion of the investigation. See *Miranda, supra,* 384 U.S. at 478. It is undisputed that he was never "in custody" in any sense, and in any event, can not rely on the detailed requirements of *Miranda* because his trial began prior to the decision in that case (Pet. App. 20a, n. 12), see *Johnson* v. *New Jersey,* 384 U.S. 719.

As for the claim that the canons of ethics were violated, it seems plain, first, that these cautions are not necessarily of constitutional dimension and, second, that they do not forbid a public official's granting of a *request* for a hearing or interview by a citizen who insists on coming without counsel.

2. Petitioner contends (Pet. 22–30) that the district court erred in quashing a subpoena served on the District Director of Internal Revenue, by whose testimony petitioner had hoped to show that other political leaders who had diverted political funds to their own use had not been prosecuted and thus that his prose-

cution was arbitrary.[3] He contends that such a showing of alleged discrimination would have constituted a valid defense to this prosecution and that it was an issue for the jury to decide (Pet. 25).

Without deciding whether a discriminatory prosecution should be dismissed, the court of appeals correctly concluded that petitioner in any event suffered no prejudice (Pet. App. 16a). Petitioner represented to the district court that he had also served subpoenas on several political leaders who would testify that they had similarly diverted funds but had not been charged with failing to report income (Supp. R. 70; Pet. App. 15a). As the court of appeals noted (Pet. App. 15a–16a), the trial judge properly ruled that evidence that there had been no similar prosecutions would become relevant only after proof that similar offenses had occurred. The judge indicated that he would allow such witnesses to testify as to whether they had been prosecuted, and that it would therefore be unnecessary to summon the district director to furnish the same information. But since petitioner never produced such evidence by calling other political leaders, despite his representation, he cannot now

[3] Yet petitioner's counsel himself cited to the district court (Pet. App. 16a, n. 10) the case of *United States* v. *Stratton* (N.D. Ill.), decided March 10, 1965 (65–1 U.S.T.C., par. 9289), involving prosecution of the former Governor of Illinois. As to the taxability of political funds diverted to personal use, see Rev. Rul. 54–80, 1954–1 Cum. Bull. 11, *supra*, pp. 3–4; *O'Dwyer* v. *Commissioner*, 266 F. 2d 575, 584–586 (C.A. 4), certiorari denied, 361 U.S. 862; *United States* v. *Jett*, 352 F. 2d 179, 182 (C.A. 6), certiorari denied, 383 U.S. 935; *Reichert* v. *Commissioner*, 19 T.C. 1027, affirmed on other grounds, 214 F. 2d 19 (C.A. 7), certiorari denied, 348 U.S. 909.

contend that he was prejudiced because the subpoena against the district director was not enforced.

3. Petitioner contends (Pet. 31–33) that the district court committed prejudicial error by excluding diaries in which he had recorded political contributions with the names of contributors in English and the amounts in Japanese. There was no prejudice since petitioner was allowed to use the diaries to their full effect by informing the jury of what they showed, *viz.*, that he received $36,509 in 1959, $31,655 in 1960, and $27,390 in 1961 (R. 1949–1953). Furthermore, admission of the diaries themselves would have added nothing to petitioner's testimony, since "it does not appear that any juror could read Japanese" (Pet. App. 13a). Moreover, despite petitioner's assertion (Pet. 33), admission of the diaries would not have tended to refute the prosecutor's remarks concerning the inadequacy of his financial records. Those remarks (Supp. R. 102–110) were directed to the concededly fictitious records of petitioner's newspaper business and his real estate holding company (Supp. R. 27–30, 37–38; R. 1963, 2004–2009, 2048–2051) and to the fact that no records of petitioner's detective agency were ever produced (Supp. R. 42–43, 56–59, 62–63, 69).

4. Nor was there prejudicial error in the trial court's refusal to admit into evidence a net-worth summary offered in the midst of petitioner's direct examination and before (see R. 2022, lines 1–4) evidence had yet been introduced to support all the alleged facts which the summary purported to reflect. The district court sustained the government's objection on the ground that petitioner had first to testify

to the underlying facts; petitioner thereafter testified at length, but the summary was never offered again (Pet. App. 13a; R. 2022–2024). The court below correctly rejected this claim of error, on the ground that petitioner "failed to follow the [trial] court's suggestion and did not offer the summary after he had testified" (Pet. App. 13a).

5. The district court correctly instructed the jury, without objection, that a political contribution "received by a political organization is not taxable to the recipient at the time received so long as it is expended for some purpose consistent with its initial donation or solicitation," but that if it is diverted to personal use by the recipient "then such diverted fund at that time constitutes taxable income to such person who converted them to their own use" (Supp. R. 110–112). The court of appeals "after a thorough appraisal of the record" concluded that there was "sufficient credible evidence" for the jury to find that petitioner converted political contributions to his own use (Pet. App. 17a). Now, petitioner seems to contend (Pet. 38–39) that the evidence showed only that he used poor judgment in the way he spent the party's funds and that as a matter of law the diversions did not constitute taxable income. If petitioner means that his purely personal attitude is the final criterion for taxability, the contention is clearly without merit and is fatally inconsistent with his acquiescence in the court's contrary instructions to the jury. If he means that a reasonable jury could not find that he diverted the monies to his own use, he is merely asserting his own interpretation of the facts in the face of the contrary

conclusion by the court of appeals. In either event, neither possibility presents an issue for this Court's attention.

6. Nor is certiorari warranted on petitioner's contention that evidence should have been excluded because it was obtained from a second examination of his books and records without a notice of the need for such re-examination, as provided in Section 7605(b) of the Internal Revenue Code of 1954 (*supra,* p. 3).

While the court of appeals noted (Pet. App. 6a, n. 4) that there is a conflict as to whether the absence of a Section 7605(b) notice would require suppression of evidence, the court here found it unnecessary to reach that question. Before petitioner's first conference with government agents a Section 7605(b) notice *was* sent to him (Pet. App. 7a; Supp. R. 6–9). Furthermore, even after that notice was sent, petitioner refused at any time to allow the agents to examine his books and records (Supp. R. 42–43, 56–59, 62–63, 69), except that his attorneys at one point submitted some cancelled checks for examination (Supp. R. 2). Thus the court below ruled alternatively that the refusal to suppress was supportable on the theory that there had been in fact no "second" examination (Pet. App. 7a).

7. Two partners in the home-construction business testified that in 1959 one of them had paid petitioner $1,750 in cash as a bribe. In corroboration, the district court admitted into evidence a cancelled check in that amount drawn on the partnership account, which one partner testified had provided the cash given to the other partner for paying the bribe. They testified that the bribe was offered to induce the city

of Cohoes to install water and sewerage facilities for the partnership's real estate development. The partnership records, showing a payment of $1,750 as "Cohoes for water" were also admitted (R. 423–429, 449, 473, 478–480; Govt. Ex. 36). Petitioner contends (Pet. 44–47) that the check and the records were irrelevant, and should have been excluded because only *relevant* documents are admissible under the Business Records Act, 28 U.S.C. 1732(a). We concede that point of law, but as the court below held (Pet. App. 5a), the testimony of the partners made the exhibits relevant. In any event, as the court below noted, no prejudice could have resulted, "for that evidence was purely cumulative to the oral testimony of the parties [*i.e.*, the two partners]" (Pet. App. 6a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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